NO 10-18-00168-CV

IN THE COURT OF APPEALS FOR
THE TENTH DISTRICT OF TEXAS
AT WACO, TEXAS

HEATHER KUTYBA,
Plaintiff-Appellant
v.
ASHLEE E. WATTS, D.V.M. and TEXAS A&M UNIVERSITY,
Defendants-Appellees.

On Appeal from the 361st Judicial District Court,
Brazos County, Texas
Cause No. 17-2110-CV-361

REPLY BRIEF OF PLAINTIFF-APPELLANT HEATHER KUTYBA

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ARGUMENT IN REPLY

1. TAMU's proposed statutory construction leads to the absurd result that veterinarians at state hospitals can never be sued—while medical doctors at state hospitals, veterinary doctors in private practice, and medical doctors in private practice can be.

Both the Legislature, in the form of passing other laws, and caselaw, reflect a consistent policy in this state to hold veterinarians to the same standards as their medical doctor counterparts. (*See generally* Appellant's Br. at 11-13.) Reading the Texas Tort Claims Act (TTCA) to exclude a waiver of immunity for veterinary negligence, besides being inconsistent with the statute's plain language in Section 101.021(2), creates the absurd result of granting veterinarians at state hospitals special status under the law.

Ms. Kutyba would have been able to sue the veterinarian and the hospital had the same facts of this case taken place in the context of a private veterinary practice. *See, e.g.*, *Gabriel v. Lovewell*, 164 S.W.3d 835, 849 (Tex. App.—Texarkana 2005, no pet.) (affirming jury finding of negligence based on death of a horse). Also, had the "death" been of a person at a state hospital, instead of the "death" of an equine, then the medical doctor at the state hospital could be held accountable for wrongdoing. But if the Appellees' interpretation is accepted, a veterinarian working for a state hospital would enjoy the special privilege of being immunized from a lawsuit.

There is no reasonable policy, or legal reason, indicating that veterinarians at state hospitals should enjoy special status; TAMU offers none. Rather, veterinarians at state hospitals, veterinary doctors in private practice, medical doctors at state hospitals, and medical doctors in private practice, should all be held to substantially the same standard of care. If this Court concludes the TTCA does not waive immunity for the death of a horse—except for when a motor vehicle causes that death, as urged by TAMU here (despite the fact that the core services provided by a veterinarian do not include operating motor vehicles)—then it effectively will free TAMU and its employed veterinarians from accountability in all cases of veterinary malpractice and undercut the state's strong policy governing the standard of care owed by all veterinary medical providers.

Even TAMU concedes that when a statutory construction leads to an absurd result, then it should be eschewed. (Appellee Br. at 11 (citing *Jaster v Comet II Construction Inc*, 438 S.W.3d 556, 570 (Tex. 2014)). In this instance, the statutory construction proposed by TAMU affords state-employed veterinarians the enviable and unjustified position of being immune from liability. There is no rationale justifying a special status for this small subset of veterinary practitioners, which is not imparted to other veterinary practitioners, their medical counterparts, nor any other medical service provider licensed and regulated by this State of Texas.

2. <u>TAMU's alleged "parade of horribles" that could result to holding veterinarians accountable is unfounded; the statute only allows suits if the government unit would, if it were a private person, be liable under Texas law.</u>

TAMU offers a parade of horribles in an attempt bolster their statutory construction arguments, but the statute itself forecloses these horribles and appropriately constrains other lawsuits. Specifically, the TTCA waives sovereign immunity only if the death is "caused by a condition or use of tangible personal or real property" and only "if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TCPRC § 101.021(2). Therefore, unless TAMU can cite a case where a private person was sued for "negligently kill[ing] grass with his shoe" (Appellee Br. at 16), then TAMU's argument that Appellant's interpretation would lead to absurd results must be rejected.

TAMU tries to argue that, if Ms. Kutyba's proposed construction were accepted, then the "death" of fungi and plants would also be actionable under the TTCA. But the fatal flaw in this argument is that the statute only allows a suit against the state if the state could be sued, if it were a private person, "according to Texas law." Of course, there is no common law precedent for suing a veterinarian for the loss of fungi and plants caused by the use of tangible personal or real property. There is, however, authority for suing a veterinarian for veterinary medical malpractice associated with the injury or death of the animal patient.

As described in Ms. Kutyba's opening brief, her allegations would support a negligence claim against TAMU and Dr. Watts, were they private persons. Ample authority exists on this point. *See Gabriel*, 164 S.W.3d at 849; *Rollins v. Williams*, No. 99-07446-J, 2001 WL 1519328 (191st Dist. Ct., Dallas County, Tex. Jan. 15, 2001) (jury verdict for plaintiff based on veterinary negligence causing death of horse); *Pruitt v. Box*, 984 S.W.2d 709, 711 (Tex. App.—El Paso 1998, no pet.) (holding that fact issue on misuse of a product to repair a horse's hoof, which increased the horse's chance of death, was created and overturning summary judgment). The TTCA ensures that the liability of the state is not greater than that of private persons under common law. It prevents the parade of horribles urged by TAMU here, and thus this Court need not worry that Appellant's construction of the statute will cause the state to waste resources defending frivolous litigation.

3. <u>Courts rely on the Texas Code Construction Act as guidance—which favors a "public interest" interpretation and a "just and reasonable" result.</u>

Ms. Kutyba has argued that the waiver of immunity is clear and unambiguous: by its own language, a governmental unit in the state is liable for "death" caused by a "condition or use of tangible personal or real property . . ." TCPRC § 101.021(2). "Death" is not statutorily defined and thus should be interpreted according to its ordinary meaning. Appellees do not appear to challenge the other terms or conditions of this waiver of immunity.

However, to the extent that this court considers other tools of statutory construction, these tools favor Appellant's interpretation. *See* Tex. Gov't Code § 311.023 (stating that a court may consider statutory construction tools whether or not the statute is considered ambiguous on its face). Under the Texas Code Construction Act, courts interpret a statute with the presumption that the "public interest is favored." Tex. Gov't Code § 311.021(5). Courts also presume that the legislature intended a "just and reasonable result." *Id.* § 311.021(3); *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.—Austin 1994, no writ) (citing § 311.021(3)), disapproved on other ground by *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003).

Here, for the reasons described above, the just and reasonable result is for veterinarians at state hospitals to be treated the same as their counterparts in private practice. The public interest is favored when clients of a state veterinary hospital, such as Ms. Kutyba, can hold the state hospital and veterinarian accountable for malpractice, just as if she had brought her animal to a private hospital.

Ms. Kutyba alleged facts sufficient to qualify for the TTCA's waiver of sovereign immunity, and the Court should have denied TAMU's plea. For all the reasons identified in this and the opening brief, reversal is warranted. Ms. Kutyba's case should proceed.

PRAYER

For these reasons, Ms. Kutyba respectfully requests that the Court reverse the trial court's judgment below and remand the case for it to proceed to discovery and trial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify that on November 5, 2018, courtesy copies of this brief were provided in electronic form at the same time this instrument was filed with the Court to counsel listed below.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(C) because it contains 1,243 words.
2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been printed in a conventional typeface no smaller than 14-point except for footnotes, which are no smaller than 12-point.

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